



UNITED STATES DEPARTMENT OF COMMERCE  
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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
08/917,044	08/19/97	FEARN	G C37-129A

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EXAMINER

HAYES, J

ART UNIT	PAPER NUMBER
1772	<i>S</i>

DATE MAILED: 12/18/98

Please find below and/or attached an Office communication concerning this application or proceeding.

Commissioner of Patents and Trademarks

**Office Action Summary**

Application No. <b>08/917,044</b>	Applicant(s) <b>Fehn</b>
Examiner <b>Jennifer Hayes</b>	Group Art Unit <b>1772</b>

Responsive to communication(s) filed on Oct 1, 1998

This action is **FINAL**.

Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

A shortened statutory period for response to this action is set to expire three month(s), or thirty days, whichever is longer, from the mailing date of this communication. Failure to respond within the period for response will cause the application to become abandoned. (35 U.S.C. § 133). Extensions of time may be obtained under the provisions of 37 CFR 1.136(a).

**Disposition of Claims**

*EPL*  Claim(s) 1-59, 60-87 and 113-138 is/are pending in the application.

*EPL* Of the above, claim(s) 60-87 and 113-138 is/are withdrawn from consideration.

Claim(s) \_\_\_\_\_ is/are allowed.

Claim(s) 1-59 is/are rejected.

Claim(s) \_\_\_\_\_ is/are objected to.

Claims \_\_\_\_\_ are subject to restriction or election requirement.

**Application Papers**

See the attached Notice of Draftsperson's Patent Drawing Review, PTO-948.

The drawing(s) filed on \_\_\_\_\_ is/are objected to by the Examiner.

The proposed drawing correction, filed on \_\_\_\_\_ is  approved  disapproved.

The specification is objected to by the Examiner.

The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. § 119**

Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).

All  Some\*  None of the CERTIFIED copies of the priority documents have been

received.

received in Application No. (Series Code/Serial Number) \_\_\_\_\_.

received in this national stage application from the International Bureau (PCT Rule 17.2(a)).

\*Certified copies not received: \_\_\_\_\_

Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).

**Attachment(s)**

Notice of References Cited, PTO-892

Information Disclosure Statement(s), PTO-1449, Paper No(s). \_\_\_\_\_

Interview Summary, PTO-413

Notice of Draftsperson's Patent Drawing Review, PTO-948

Notice of Informal Patent Application, PTO-152

--- SEE OFFICE ACTION ON THE FOLLOWING PAGES ---

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## **DETAILED ACTION**

### ***Election/Restriction***

1. Applicant's election with traverse of the restriction requirement in Paper No. 4 is acknowledged. The traversal is on the ground(s) that "the inventions of the 2 groups derive from a single inventive concept". This is not found persuasive because the test for determining whether a restriction is proper in this case is if either of the following can be shown: (1) that the process as claimed can be used to make other and materially different product or (2) that the product can be made by another and materially different process. A materially different process for making the claimed invention has been shown and as such, the requirement is still deemed proper and is therefore made FINAL.

### ***Claim Rejections - 35 USC § 112***

2. Rejections made under this section in the previous Office Action and not repeated herein are withdrawn.
3. The following rejection has been withdrawn in regard to claims 2 and 23-59 and repeated with regard to claims 1, and 3-22.
4. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to

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make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

5. Claims 1, and 3-22 are rejected under 35 U.S.C. 112, first paragraph, as based on a disclosure which is not enabling. A second continuous barrier layer critical or essential to the practice of the invention, but not included in the claim(s) is not enabled by the disclosure. See *In re Mayhew*, 527 F.2d 1229, 188 USPQ 356 (CCPA 1976). Replete throughout the specification the second continuous layer is referred to as a barrier layer and effectively provides a barrier to the contaminants of the recycled plastic layer.

6. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

7. Claims 1-59 are rejected under 35 U.S.C. 112, second paragraph, as failing to set forth the subject matter which applicant(s) regard as their invention. Evidence that claims 1-59 fail(s) to correspond in scope with that which applicant(s) regard as the invention can be found in Paper No. 4 filed 10/1/98. In that paper, applicant has stated "Applicant's invention . . . involves the use of post-consumer recycled (~~PCR~~) resins in containers that may hold substances consumed by people. The critical problem requiring solution concerns preventing consuming of undesirable substances from the ~~PCR~~ resins by human beings", and this statement indicates that the invention is different from what is defined in the claim(s) because there is no mention in the claims of human consumable substances.

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8. Claims 1-59 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

9. The terms "substantially continuous" and "continuous" in claims 1, 3, 23, 24, 26, 29, 44, 45, 47 and 59 is unclear and renders the claim indefinite. The term "substantially continuous" appears to be defined at page 6, lines 24-26, however the term "continuous" does not appear to be defined. Thus it is unclear what the difference is between the claims reciting a "substantially continuous" film and those reciting a "continuous" film. One of ordinary skill in the art would not be reasonably apprised of the scope of the invention.

10. Claim 59 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. It is unclear of what resin the second layer is devoid. The second layer appears to be a new layer and is interpreted for purposes of examination to include polyethylene.

The examiner notes applicant's statements regarding the language of claim 59 and referring to amended language for clarity, however, an actual amendment to claim 59 was not submitted. A formal amendment is requested.

***Claim Rejections - 35 USC § 103***

11. The rejections made in the previous Office Action, not repeated herein are withdrawn.

The following are new rejections necessitated by amendment.

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12. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

13. Claims 1-3 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bright (US 5,508,076) in view of Yano et al. (US 5,238,718). Bright generally teaches a multilayered preform for producing bottles or containers of polymeric resins and the general concept of the present invention which is to provide an outer layer of recycled plastics with an inner layer of virgin resin or food contacting resins within federal regulations. (Col. 1, lines 23-32). Bright discloses that suitable resins depends on desired performance criteria and specifically teaches a structure of an inner and outer layer and an intermediate barrier layer.

Yano et al. disclose multilayered blow molded bottles having a structure of A/B/C/B/A wherein A is a polyolefin such as polyethylene or polypropylene, B is an adhesive and C is a barrier layer and the layer is formed on the surface of and in intimate contact with the first or outer layer by way of adhesives. Yano et al. do not specifically teach the inner A layer is substantially continuous, however, since the bottles are used as containers for products for human consumption, (col. 1, lines 9-11) and the resin is taught to have specific properties to avoid drawdown phenomenon which results in nonuniform thickness of the blow molded article (col. 3, lines 10-14), the inner layer A is believed to inherently be "substantially continuous" and/or "continuous" within the definition of the present disclosure. It would have been obvious matter of

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choice for one of ordinary skill in the art to select a polypropylene film for the inner layer which would inherently act as a barrier layer to materials or contaminants in a polyethylene resin used for the outer layer based upon the general knowledge available to the skilled artisan regarding functional capabilities of each resin, such as processability, stiffness, appearance, and food contact standards. It would have also been obvious to one of ordinary skill in the art to use a PER polyethylene as an outer layer as taught by Bright to reduce costs and in view of environmental consciousness.

14. Claim 4-15, and 18-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bright and Yano et al. as applied to claims 1-3 above, and further in view of Moore et al. (US 5,712,009). Bright and Yano et al. fail to teach a film located to the interior of all layers which have at least or greater than 48 ppb/.020 of a contaminant and an outer polyethylene resin incorporating post consumer recycled materials. Bright, Yano et al. and Moore et al. suggest the use of plastic containers for food and/or beverages. Moore et al. disclose that said resin contains contaminants. (Col. 1, lines 38-40). It would have been obvious to one of ordinary skill in the art to use a post consumer recycled resin as an outer layer in a plastic container for foods or beverages having high contaminants where another layer serving as a barrier is between the post consumer recycled material and the contents as presently claimed in order to save costs.

Further the formation of domains within a polypropylene- polyolefin, particular polypropylene- ethylene blend is well known to those of ordinary skill in the art and well within

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the purview of the skilled artisan. Thus it would have been obvious to one of ordinary skill in the art to use a blend of polypropylene with another polyolefin dispersed in domains.

Bright and Yano et al. also fail to teach a specific weight percent of the container post consumer recycled plastic. Moore et al. disclose post consumer recycled layers of 10 and 70% of the wall of the container and 10% of the innermost and outermost polyethylene layers. (Fig.2).

Moore et al also disclose the densities of the various materials which make up the different layers. See Table 1 and Col. 3, lines 47- col. 4, lines 1-9). It would have been obvious to one of ordinary skill in the art, to substitute a continuous polypropylene interior film for the polyethylene taught by Moore et al. Based upon their equivalence in the art as shown by Yano et al. and to use general mathematical principals to determine suitable weight percents for post consumer recycled layers and the continuous polypropylene film to achieve the desired barrier properties, appearance, and processability in forming a container out of recycled plastic while keeping cost low. Moore et al. also suggest that post consumer resin be used because of the large quantities of high density polyethylene post consumer resin available. (Col. 1, line s 34-39). It therefore would have been obvious to one of ordinary skill in the art to use a post consumer recycled resin which includes a majority of polyethylene.

Polypropylene blends are well known to those of ordinary skill in the art. It would have been obvious to one of ordinary skill in the art to use a polypropylene blend with another polyolefin such as polyethylene to achieve the desired structural characteristics of the container.

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Applicant's process limitations recited in claims 10-12 do not impart patentability to the claimed article. Additionally, thermoforming, blow molding, and injection molding are well known processes to those of ordinary skill in the art and it would have been obvious to one of ordinary skill in the art to employ conventional blow molding, injection molding or thermoforming techniques to make a container for beverages or food having the structure taught by Yano et al. and/or Moore et al. as previously discussed.

Further, it is generally known in the art that the thickness of the barrier layer regardless of its function will have an effect on its ability to sufficiently perform its function whether it is prevention of migration of contaminants or moisture or gases. In the case where post consumer recycled products are used as an outer layer, it would have been obvious to one of ordinary skill in the art to determine the appropriate thickness of layers situated interior to the PER to prevent migration of the PER materials into the contents of the container. Thus, it would have been obvious to one of ordinary skill in the art to make a container having a post consumer recycled polyethylene exterior layer at least 15 % by weight of the container having an interior polypropylene continuous film layer of sufficient thickness to be capable of preventing migration of contaminants into the contents of the container without undue experimentation. Additionally, it is the structural differences between the prior art and the claimed invention which determine patentability. It has not been shown that the prior art structure taught by Yano et al. is not capable of performing the claimed function.

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15. Claims 16 and 17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bright, Yano et al., and Moore et al. as applied above, and further in view of Strum et al (US 4,824,618). Strum et al. generally teach structures for multilayered plastic bottles for beverages having a structural layer of PP or PE as the innermost, or outermost or both layers, an intermediate barrier layer, adhesive layers and at least one layer of reground material to reduce waste and costs. (Col. 1, lines 22-46). It would have therefore been obvious to one of ordinary skill in the art to use a reground layer as an outer layer to reduce wastes and costs during manufacture.

16. Claims 23-24, and 26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bright as applied above and further in view of Cushing et al. (US 5,196,469). Cushing et al. teach a multilayered structure for forming recyclable plastic bottles by applying a homogeneous ethylene vinyl alcohol film coating to an olefin polymer substrate including polyethylene, polypropylene and chlorinated fluorinated ethylene polymers. (Col. 4, lines 20-26). Polypropylene/adhesive/EVOH/adhesive/polypropylene is specifically taught at col. 4, lines 63-65). Cushing et al also teach that the container may be blow molded. Col. 4, line 64. Cushing et al. fail to specifically teach a post consumer recycled polyethylene exterior layer. However, post consumer plastics are known to reduce costs of manufacturing and given the express teaching that polyethylene and polypropylene are equivalent substrates for the structure of the invention taught by Cushing et al., it would have been obvious to one of ordinary skill in the art at the time of the

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invention to substitute a post consumer recycled polyethylene layer for the first exterior polypropylene layer taught by Cushing et al to reduce material costs.

17. Claim 25 rejected under 35 U.S.C. 103(a) as being unpatentable over Bright and Cushing et al. as applied above, and further in view of Moore et al. Bright and Cushing et al. fail to teach the film being located toward the interior from all layers which contain at least 48 ppb/.020 in contaminant. Moore et al. suggest the use of post consumer polyethylene resin in making plastic containers for food and/or beverages. (Col. 1, lines 35-43). Moore et al. disclose that said resin contains contaminants. (Col. 1, lines 38-40). It would have been obvious to one of ordinary skill in the art to use a post consumer recycled resin as an outer layer in a plastic container for foods or beverages having high contaminants where another layer serving as a barrier is between the post consumer recycled material and the contents in conjunction with and EVOH barrier layer as presently claimed.

18. Claims 27-33, 35-39, and 40-43 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bright and Cushing et al. as applied above, and further in view of Moore et al (US 5,712,009). Cushing et al. fail to teach a specific amount by weight of the container of the post consumer recycled plastic or the second continuous polypropylene film or the percent by weight of the container of the EVOH layer.

Moore et al disclose post consumer recycled layers of 10 and 70% of the wall of the container and 10% of the innermost and outermost polyethylene layers. (Fig.2). Moore et al also disclose the densities of the various materials which make up the different layers. See Table 1 and

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Col. 3, lines 47- col. 4, lines 1-9). It would have been obvious to one of ordinary skill in the art to substitute polypropylene for the polyethylene taught by Moore et al and to use general mathematical principals to determine suitable weight percents for post consumer recycled layers to achieve the desired barrier properties, appearance, and processability in forming a container out of recycled plastic while keeping cost low. It would have also been obvious to one of ordinary skill in the art to adjust the percent by weight of the EVOH layer of the container to achieve the desired barrier properties while maintaining the desired appearance. Moore et al also suggests that post consumer resin be used because of the large quantities of high density polyethylene post consumer resin available. (Col. 1, line s 34-39). It therefore would have been obvious to one of ordinary skill in the art to use a post consumer recycled resin which includes a majority of polyethylene. Moore et al also recognizes that post consumer plastic has contaminants and it would have been obvious to one of ordinary skill in the art to use a post consumer plastic having greater than 48 ppb/.020 in of contaminant, without undue experimentation.

Cushing et al teach that the container can be blow molded (Col. 4, line 64) but fail to teach that the container may be injection molded or thermoformed. However, these process limitations do not impart patentability to the article claimed. Additionally, thermoforming and injection molding are common techniques well known to those of ordinary skill in the art and thus it would have been obvious to one of ordinary skill in the art to use any of these conventional techniques in making a multilayered container as taught by Cushing et al.

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Further, it is generally known in the art that the thickness of the barrier layer regardless of its function will have an effect on its ability to sufficiently perform its function whether it is prevention of migration of contaminants or moisture or gases. In the case where post consumer recycled products are used as an outer layer, it would have been obvious to one of ordinary skill in the art to determine the appropriate thickness of layers situated interior to the PER to prevent migration of the PER materials into the contents of the container. Thus, it would have been obvious to one of ordinary skill in the art to make a container having a post consumer recycled polyethylene exterior layer at least 15 % by weight of the container having an interior polypropylene continuous film layer of sufficient thickness to be capable of preventing migration of contaminants into the contents of the container without undue experimentation. Additionally, it is the structural differences between the prior art and the claimed invention which determine patentability. It has not been shown that the prior art structure taught by Yano et al. is not capable of performing the claimed function.

19. Claim 34 is rejected under 35 U.S.C. 103(a) as being unpatentable over Bright, Cushing et al. and Moore et al. as applied above, and further in view of Strum et al (US 4,824,618). The combination of references fails to teach a sixth layer comprising reground trim scrap located on the exterior from the fourth layer. Strum et al. teaches generally structure multilayered plastic bottles for beverages having a structural layer of PP or PE as the innermost, or outermost or both layers, an intermediate barrier layer, adhesive layers and at least one layer of reground material to reduce waste and costs. (Col. 1, lines 22-46). It would have therefore been obvious to one of

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ordinary skill in the art to use a reground layer as an outer layer to reduce wastes and costs during manufacture.

20. Claims 44-54, and 58 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mehta et al (US 4,880,675) in view of Bright and Moore et al. Moore et al. is applied as above. Mehta et al. teach a plastic container comprising a fluorinated inner layer and a polypropylene outer layer which is formed by conventional blowmolding, thermoforming or injection processes. (Col. 2, lines 6-17). The fluorinated PE surface forms the interior surface of the container. (Col. 2, lines 18-19). Mehta et al fail to teach an outer layer of post consumer recycled polyethylene. However, bright teaches the general use of recycled resins in an outer layer and in inner food contacting layer and Moore et al. suggests the use of post consumer recycled polyethylene in the production of plastic beverage and food containers due to the large quantities available to reduce wastes and cost. It would have been obvious to one of ordinary skill in the art to substitute a post consumer recycled polyethylene for the polypropylene taught by Mehta in combination with the fluorinated polyethylene to achieve a container having good aroma and flavor barrier properties. It would also have been obvious to include a non post consumer polyethylene layer between the post consumer recycled resin layer and the fluorinated polyethylene layer to achieve good barrier properties and structural rigidity while maintaining low costs due to reduced material costs associated with the use of the post consumer plastic as an outer layer.

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Mehta is silent as to the continuity of the fluorinated polyethylene film, however it is thought to be inherently continuous or uninterrupted to achieve the desired flavor and aroma barrier properties.

Mehta et al also fail to specifically teach the weight percent of the container of the post consumer recycled plastic. Moore et al disclose post consumer recycled layers of 10 and 70% of the wall of the container and 10% of the innermost and outermost polyethylene layers. (Fig.2). Moore et al also disclose the densities of the various materials which make up the different layers. See Table 1 and Col. 3, lines 47- col. 4, lines 1-9). It would have been obvious to one of ordinary skill in the art to substitute post consumer recycled polyethylene as suggested by Moore et al for the polypropylene taught by Mehta and to use general mathematical principals to determine suitable weight percents for post consumer recycled layers to achieve the desired barrier properties, appearance, and processability in forming a container out of recycled plastic while keeping cost low. Moore et al also suggests that post consumer resin be used because of the large quantities of high density polyethylene post consumer resin available. (Col. 1, line s 34-39). It therefore would have been obvious to one of ordinary skill in the art to use a post consumer recycled resin which includes a majority of polyethylene. Moore et al also recognizes that post consumer plastic has contaminants and it would have been obvious to one of ordinary skill in the art to use a post consumer plastic having greater than 48 ppb/.020 in of contaminant, without undue experimentation.

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21. Claims 55 and 56 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mehta and Bright and Moore et al. as applied above. The combination of Mehta and Moore et al fail to teach a container wherein the film is of sufficient thickness to prevent the passage of post consumer recycled plastic contaminants into the contents of the container. It is generally known in the art that the thickness of the barrier layer regardless of its function will have an effect on its ability to sufficiently perform its function whether it is prevention of migration of contaminants or moisture or gases. In the case where post consumer recycled products are used as an outer layer, it would have been obvious to one of ordinary skill in the art to determine the appropriate thickness of layers situated interior to the ~~PCR~~ to prevent migration of the ~~PCR~~ materials into the contents of the container. Thus, it would have been obvious to one of ordinary skill in the art to make a container having a post consumer recycled polyethylene exterior layer at least 15 % by weight of the container having an interior polypropylene continuous film layer of sufficient thickness to be capable of preventing migration of contaminants into the contents of the container without undue experimentation. Additionally, it is the structural differences between the prior art and the claimed invention which determine patentability. It has not been shown that the prior art structure taught by Yano et al. is not capable of performing the claimed function.

22. Claim 57 is rejected under 35 U.S.C. 103(a) as being unpatentable over Mehta, Bright and Moore et al. as applied above, and further in view of Strum et al. Strum et al. is applied above. It would have been obvious to one of ordinary skill in the art to use a reground layer as an outer layer to reduce wastes and costs during manufacture.

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***Response to Arguments***

23. Applicant's arguments with respect to claims 1-59 have been considered but are moot in view of the new ground(s) of rejection. Avery has been withdrawn as a reference due to the newly amended claims. The basic concept of the present invention to make a multilayered container for human consumable products using an inner content contacting layer and an outer recycled layer was known in the art at the time of the invention as shown by Bright and Moore et al. The basic materials used for the different layers were also generally known in the art and substituting recycled, reground or scrap plastics was also known in the art for the purpose of reducing manufacturing costs as well as for protecting the environment. Thus the present invention is a combination of known elements which is not considered to be patentable. Additionally, in light of the teaching of Bright of the food contact standards set forth in the Code of Federal Regulations, determination of sufficient thickness of the barrier layer to prevent migration, acceptable amount of contaminants in the food contacting layer, and amounts of post recycled resin amounts to discovering an optimal or workable range which involves only routine skill in the art. *In re Aller*, 220 F.2d 454, 105 USPQ 233 (CCPA 1955).

Further, in regard to the specific references, applicant argues that the container of Moore et al is not intended to provide edibles to a human being, however, this feature is not recited in the claims. Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

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Applicant also argues that the use of reground material taught by Strum et al. is not the same as the claimed PER materials. However, claims 16, 17 and 34 which are rejected in view of Strum et al. recite reground trim scrap which is the same material referred to in Strum et al. as the applicant points out.

### *Conclusion*

24. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.



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jmh

December 11, 1998